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Veröffentlichungsversion / Published Version
Arbeitspapier / working paper

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Working Paper

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WZB Discussion Paper, No. SP IV 2016-109

Provided in Cooperation with:
WZB Berlin Social Science Center

Suggested Citation: Joerges, Christian; Kreuder-Sonnen, Christian (2016) : Europe and European studies in crisis: Inter-disciplinary and intra-disciplinary schisms in legal and political science, WZB Discussion Paper, No. SP IV 2016-109, Wissenschaftszentrum Berlin für Sozialforschung (WZB), Berlin

This Version is available at:
http://hdl.handle.net/10419/149984

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Discussion Paper
SP IV 2016–109
September 2016

Research Area
International Politics and Law
Research Unit
Global Governance

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Abstract

Europe and European Studies in Crisis: Inter-Disciplinary and Intra-Disciplinary Schisms in Legal and Political Science

by Christian Joerges, Christian Kreuder-Sonnen*

European Studies used to be dominated by legal and political science approaches which hailed the progress of European integration and its reliance on law. The recent set of crises which struck the EU have highlighted fundamental problems in the ways and means by which European integration unfolds. The quasi-authoritarian emergency politics deployed in the euro crisis is a radical expression of the fading prevalence of democratic processes to accommodate economic and social diversity in the Union. As we argue in this paper, however, the mainstreams in both disciplines retain a largely affirmative and apologetic stance on the EU's post-democratic and extra-constitutional development. While political science contributions mostly contend themselves with a revival of conventional integration theories and thus turn a blind eye to normatively critical aspects of European crisis governance, legal scholarship is in short supply of normatively convincing theoretical paradigms and thus aligns itself with the functionalist reasoning of the EU's Court of Justice. Yet we also identify critical peripheries in both disciplines which intersect in their critical appraisal of the authoritarian tendencies that inhere the crisis-ridden state of European integration. Their results curb the prevailing optimism and underline that the need for fundamental reorientations in both the theory and practice of European integration has become irrefutable.

Keywords: European crisis, authoritarian tendencies, European Studies, European integration

* We would like to thank an anonymous reviewer for substantive comments and Chris Engert and Patrick Frankenbach for editorial assistance.

Zusammenfassung

Europa und Europawissenschaften in der Krise: Interdisziplinäre und Interdisziplinäre Schisms in Rechts- und Politikwissenschaften

von Christian Joerges, Christian Kreuder-Sonnen

Die European Studies werden von rechts- und politikwissenschaftlichen Ansätzen dominiert, welche den Fortschritt der europäischen Integration und somit den Verlass auf das Rechtswesen bejubelt haben. Die jüngsten Krisen in der Europäischen Union haben grundlegende Probleme in Bezug auf die Entwicklung der europäischen Integration aufgedeckt. Der quasi-autoritäre Notfallplan im Zuge der Eurokrise, um der wirtschaftlichen und sozialen Vielfalt der Union entgegenzukommen, ist ein radikaler Ausdruck der verblassenden Macht demokratischen Prozesse. Wie wir in diesem Artikel argumentieren, halten jedoch die Hauptströmungen beider Disziplinen an dem weitgehend zustimmenden und zurückhaltenden Standpunkt bezüglich der postdemokratischen und außerkonstitutionellen Entwicklung der EU fest. Während sich die politikwissenschaftlichen Beiträge meist mit einer Wiederbelebung der herkömmlichen Integrationstheorien zufriedenstellen und damit die Augen vor normativ kritischen Aspekten des europäischen Krisenmanagements verschließen, bieten die Rechtswissenschaften auch keine normativ überzeugenden, theoretischen Paradigmen. Sie richten sich demnach nach den funktionalistischen Folgerungen des Europäischen Gerichtshofs. Nichtsdestotrotz erkennen wir auch kritische Peripherien in beiden Disziplinen an, welche im Rahmen der kritischen Beurteilung der autoritären Tendenzen, die dem krisengeplagten Zustand der europäischen Integration innewohnen, zusammenlaufen. Ihre Ergebnisse bremsen den vorherrschenden Optimismus und verdeutlichen, dass die Notwendigkeit für eine grundlegende Neuorientierung der europäischen Integration sowohl in Theorie als auch in der Praxis unabweisbar ist.

Schlüsselwörter: europäische Krise, autoritäre Tendenzen, Europastudien, europäische Integration

I. INTRODUCTION

Europe is in troubled waters. What does the unfortunate state of the European Union (EU) reveal about the state of the scholarly study of the integration project? Should the consecutive constitutional crises be understood as challenges to the paradigms, orientations, and expectations which have guided European studies for the past decades? Our essay will discuss this question with regard to the two disciplines which used to be at the forefront of European studies: political and legal science[1]. We argue that the euro crisis, in particular, brings to light some fundamental problems in the construction of the European polity which go along with a number of normative and analytical misconceptions in these academic disciplines. In distinct ways, the dominant contributions in political science and law turn a blind eye to the essential challenges exposed by the crisis and the crisis politics deployed as a solution. While a considerable rift continues to separate the disciplines, both show parallels in their internal struggles over how to deal with the present situation. We show that the disciplines' respective cores, while disregarding each other, are largely affirmative and apologetic with regard to the state and progress of European integration, whereas a critical periphery in both legal and political science intersects in the analysis and deploration of an increasingly authoritarian EU which gives rise to a more fundamental questioning of the path towards an 'ever closer Union.'

Traditionally, legal and political science have approached their common objects of study on distinct disciplinary paths. This is also true for the European integration project. Jürgen Habermas (1994 [1998]) has succinctly characterised their specifics in one of his earlier essays on democratic constitutionalism. Legal scholars and political scientists, he observed, both tend to deal with law in a distinct disciplinary logic. Lawyers focus on normative issues and the art of legal reasoning. Social scientists treat law as an empirical phenomenon. The latter do not engage in a *lege artis* interpretation and application of rules, but explore the impact of law, its effectiveness, and its processes of implementation. The validity and facticity of law tend to be seen as separate categories. Lawyers, on the other hand, tend to defend the autonomy of legal operations and the distinctiveness of doctrinal constructs.

These divisions notwithstanding, lawyers and political scientists concerned with Europe have long shared a common denominator which underlies their respective research agendas: a

[1] In European studies, economics remained in the background until very recently. As disciples of law and political science we are somewhat hesitant to enter into a debate with economics. But it seems apparent to us that the ever stronger leadership of economics and its functionalist reasoning after the outbreak of the financial crisis in 2008 signal an exhaustion of the project of integration by democratic politics. We discuss the turn to expert governance in Section III.

principled enthusiasm for the fostering of integration. Both disciplines provide essentially compatible rationales for moves towards "ever more" and, by conceptual implication, "ever better" Europe. This trans-disciplinary consensus on the common agenda has made the disciplinary specifics and differences seem much less significant than the shared commitment for the progress of the integration project. In political science, Ernst Haas' (1958 [2004]) neo-functionalist theory of integration has first inspired generations of pro-European scholars to focus on the potential of shifting the loyalties and expectations of political actors to the supranational level. Legal scholarship, on the other hand, in its re-construction of the modes and accomplishments of the integration project, was fascinated by its reliance on law: "integration through law" became both the trademark and the agenda of European legal studies (Cappelletti, Seccombe and Weiler 1986). Law was conceptualised as "the object and the agent of integration" (Dehousse and Weiler 1990: 243) and even political scientists started talking about the determinants of "legal integration" (Burley and Mattli 1993).

However, the predominance of formal legal rules as the object and agent of integration started to erode in the mid-1980s. It was Europe's new regulatory activities which first led Giandomenico Majone (e.g. 1996) to proclaim the advent of a "regulatory state" and thereafter the turn to governance which the Prodi Commission proclaimed in 2001 (CEC 2001) which dominated the agenda of European studies. These innovations did not affect the transdisciplinary confidence in, or the dedication to, further integrational steps. The turn to "governance" held the promise of ambitious reforms, of a new division of labour between political actors and civil society, and a more democratic form of partnership between the different layers of governance in Europe. But for some time, pre-occupation in both disciplines turned away from analysing integration and focused on analysing the functioning of the EU as a legal and political system. While the ensuing debates about the democratic legitimacy of the EU certainly spurred some normative critique (see Joerges 2002; 2008; Scharpf 1999; Føllesdal and Hix 2006), the majorities in both disciplines welcomed the governance turn and associated reforms as steps towards a more integrated and eventually a better European polity.

Today, after too many years of crisis, the "culture of total optimism" (Majone 2014: 58-87) has lost its momentum in the debates over Europe. In the responses of the Union and national governments to the euro crisis, we have witnessed the emergence of a new style of discretionary governance, which not only transformed the central pillars of the EU's legal order fundamentally, but also unveiled and fostered long dormant transnational conflict-constellations.[2] From the beginning, the European crisis response was marked by a rationale of

[2] While there have been many situtations in the history of the EU that were perceived as "crises" (such as

safeguarding both the institution of the common currency as well as its neo-liberal underpinnings at all legal and political costs. In the light of what came to be perceived as an existential threat to the European Union as a whole, both member state executives and the European institutions resorted to "rescue" measures that were, in some instances, incompatible with the existing legal order, in other instances, outside the European legal order, and, in most instances, in violation of the principle of democratic rule-setting (e.g. Scicluna 2014; White 2015b: 587-593). Take the example of the emergency credit facilities (EFSF and ESM) established with their own legal personality outside the purview of the EU primary law to circumvent the so-called "no-bailout clause" and to allow the "*Troika*" (the IMF, the EU Commission, and the ECB) to impose austerity measures on countries in need of the support programmes with basically unfettered executive discretion. Or take the example of the ECB's (self-)empowerment to act as a "lender of last resort" to governments in the Eurozone and to involve itself in the member states' fiscal policies without the faintest degree of democratic accountability. This practice can be called executive managerialism (Joerges and Weimer 2013), emergency politics (White 2015a), or exceptionalism (Kreuder-Sonnen 2014). It marks the contours of an informal, undeclared European state of emergency in which the executive institutions (both intergovernmental and supranational) are empowered at the expense of legislative and judicial institutions, and legal as well as social norms are suspended to the benefit of political or technocratic discretion. If not rolled back or contained, the result is a disintegrated European legal order in which some authority structures are imbued with permanent traits of authoritarianism (Joerges 2014; Dawson 2015; Kreuder-Sonnen and Zangl 2015).

How did the field of European studies in law and political science react to this? In this essay, we point to new disagreements between, but also within, the disciplines of legal and political science, which have been provoked by the present *malaise*. At an abstract level, the disciplinary schism identified by Habermas (1994 [1998]) remains *cum grano salis* characteristic of the prevailing approaches in both disciplines to the European crisis. While doctrinal or re-constructive legal analyses of the crisis measures were broadly concerned with the normative quality and legal legitimacy of the decisions in question, political science analyses have rediscovered the conventional integration theories and thus mainly focused on explaining the aggregate institutional design outcomes (Kreuder-Sonnen 2016). As we show, however, the decline of the "culture of total optimism" in the light of the implications of Europe's emergency governance has also led to contestation within the respective disciplines: in law, the bulk of legal

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the 1965-66 empty chair crisis for instance), none has incited a comparable degree of legal and political transformation as the euro crisis. This should be reason enough to treat the present crisis context as unique.

scholarship and jurisprudence tends to accommodate the European "crisis law" interpretively, either by reference to formalistic or teleological arguments. Yet, there is also a growing group of critical legal scholars who refuse to accept the submission of law to crisis politics and advocate a re-calibration of normativity and facticity. In political science, the great majority of contributions seem insensitive to the normatively problematical aspects of the European crisis by mainly applying conventional theories of integration to study what is conceived as "integration accomplishments" of the crisis measures. On the other hand, also among political scientists, there are a substantive number of critical voices that deplore the normative demise of the European polity at large.

In both disciplines, there are thus structurally parallel developments that create fractions with similar positions: the mainstream accounts and positions in legal and political science stand for normalisation, whereas the critical interventions from both disciplines tend to converge around the notion of emergency politics and discretionary rule. In our critical engagement with the current state of the disciplinary debates, we take issue in particular with the implicitly or explicitly apologetic approaches that we find in both legal and political science. We insist that political science analyses that exclusively revert to the usual theories of integration tend to bracket normatively problematical aspects of political order by merely focusing on institutional design outcomes in terms of intergovernmentalism and supranationalism. In the same vein, we also criticise the type of legal scholarship that contents itself with formalistic technical exercises and a jurisprudence that contents itself with political obedience.

The essay is structured as follows: Section II takes a closer look at the political science contributions on the effects of the euro crisis on the state of the Union. It highlights the normative complacency of conventionalist approaches that tend to convey the picture of business-as-usual politics in the EU, and contrasts them with the critical re-constructions of mainly lawyers, but also normatively inspired political scientists, who see the European crisis governance as embodying a transnational state of exception which allows for unconstrained discretionary authority. In Section III, this critical account serves as a background against which we discuss the failure of prominent legal conceptualisations and theories to justify transnational governance and authority. We argue that both the crisis *and* the "crisis law" which it provoked, expose fundamental flaws in these approaches, which leaves the legal discipline with but one authority to follow, namely, the law, as interpreted by the Court of Justice of the EU. Yet, a discussion of the Court's two most important crisis judgments underlines the overburdening of the Court and its consequently deferential stance *vis-à-vis* the alleged political necessities, which leads to a further normalisation, even legalisation, of discretionary politics. Section IV

concludes with a critical statement on the state of "authoritarian legality" produced by way of emergency politics and its normalisation.

II. POLITICAL SCIENCE AND THE EURO CRISIS[3]

We start with a critique of the uni-dimensionality in most political science accounts of the euro crisis, which tend to focus on specific institutional design features that are treated as conventional phenomena to be explained with conventional theories of integration and institutional change. The discipline's mainstream thus turns a blind eye to the normative dimensions of the crisis-induced structural transformations of the European legal order. First, we show that the bulk of the political science contributions are concerned with the institutional effects of the crisis and their consequences for the progress of integration. Second, we demonstrate that the explanatory accounts of these outcomes revert to theories of integration and institutional change that tend to portray integration steps as *per se* beneficial political achievements – regardless of what this means for the legitimacy of the changing political order. Third, we delineate what it actually implies for the European polity by drawing on some more critical theoretical interventions that portray the European crisis governance as emergency politics in an undeclared transnational state of exception, which transitions into permanent traits of authoritarianism in the EU's legal order.

II.1. The Institutional Design Focus of Political Science Contributions

The political science literature on the effects of the euro crisis has predominantly been concerned with three issues: first, the changing relative weight and political prominence of EU institutions such as the European Council, the Commission, and the Parliament (Dinan 2012; Bauer and Becker 2014; Rittberger 2014); second, changes in the governance architecture of the economic and monetary union (EMU) (see Tosun *et al.* 2014: 203-204 for an overview); and third, public perception and the attitudes of citizens towards the EU or the common currency (e.g., Daniele and Geys 2014; Kuhn and Stoeckel 2014). What ties these contributions together is their focus on the crisis-induced institutional mutation of the European integration project: the dynamic evolution of the European institutions is described with regard to the question of whether the crisis has provoked more intergovernmental or more supranational decision-making procedures (e.g., Falkner 2016); the crisis-induced EMU reforms are characterised as major integration steps on the way towards "an ever closer union" (Buti and Carnot 2012); and the public opinion and politicisation pieces ask whether the observed changes impede or enhance further integration.

[3] This section builds on Kreuder-Sonnen (2016).

The major theoretical puzzle for explanatory accounts of the integration outcomes is that, against the expectations of post-functionalism, huge integrative steps have been realised in spite of the mass politicisation of European issues during the crisis. As stipulated by Hooghe and Marks (2009), broad politicisation should foster an already prevailing "constraining dissensus" amongst European political parties and mass publics, which hampers further integration. However, to many observers, the crisis demonstrated that "the constraining dissensus does not seem to constrain governments very much" (Genschel and Jachtenfuchs 2016: 166; see also Schimmelfennig 2014). In fact, there have been major integrative changes in the European governance architecture on at least three dimensions: the build-up of fiscal capacity, fiscal surveillance, and the Banking Union. The EU *fiscal capacity* refers to the emergency credit facilities which were institutionalised during the crisis, starting with the preliminary rescue packages called European Financial Stability Facility (EFSF) and European Financial Stability Mechanism (EFSM), and later the permanent European Stability Mechanism (ESM). They were complemented by the European Central Bank's (ECB) bond-buying programmes, which amount to indirect fiscal assistance (Schelkle 2014).[4] Integration in the realm of *fiscal surveillance* has mostly taken place by legislative amendments to the Stability and Growth Pact (SGP), most notably through the so-called "six-pack" and "two-pack" sets of the EU regulations (and one directive) which strongly increased the Commission's competences in the monitoring, assessment, correction, and, eventually even sanctioning of national budget plans. In the framework of the *Banking Union*, the ECB has been delegated authority for the supervision and the resolution of the private banking sector of the EU. Amidst a plethora of new regulatory agencies in the field of prudential regulation and supervision, the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM) put the ECB in a position to control the systemic risk of banks and, when necessary, to decide on their liquidation (Gren *et al.* 2015).

II.2. The Normative Complacency of Conventional Theories of Integration

In order to account for these changes theoretically, scholars in particular have revived the most conventional theory of European integration: neo-functionalism. Most importantly, observers have pointed to the explanatory relevance of *functional spillover*, which comes about when differential integration in interdependent policy areas creates functional dissonances that can only be resolved by further integration (Schimmelfennig 2012; Fehlker *et al.* 2013; Vilpisauskas

[4] The Securities Market Programme (SMP) initiated in 2010 as well as the Outright Monetary Transactions (OMT) programme announced in 2012.

2013: 363-368; Niemann and Ioannou 2015: 200-205).[5] For example, in order to explain the build-up of fiscal capacity and fiscal surveillance, neo-functionalists point to the discrepancy between exclusive Union competences in monetary policy on the one hand, and member state sovereignty in fiscal and economic policy, on the other. Arguably, this divergence created negative externalities, as demonstrated by the development of the crisis itself and by the lack of existing response mechanisms. Both the rescue facilities and the strengthening of fiscal surveillance are thus seen as functional adaptations of an originally skewed regime (e.g. Niemann and Ioannou 2015: 201; see also Genschel and Jachtenfuchs 2013: 83).

Neo-functionalism's longstanding competitor, liberal intergovernmentalism, has also been advanced to account for the integrative leaps during the crisis. Intergovernmentalism conceives of European integration as the result of hard-nosed bargains between national leaders whose preferences are determined by the (economic) interests of powerful domestic groups. Schimmelfennig (2015) uses the theory to explain the concrete burden sharing of adjustment costs associated with the crisis-induced integration steps. He shows that the asymmetrical interdependence in favour of the "donor states" over the "recipient states" resulted in bargaining outcomes that reflect the formers' (and especially Germany's) preferences predominantly (Schimmelfennig 2015: 184-188). In terms of institutional design outcomes, this translates into strict intergovernmental control of financial assistance by solvent countries and more supranational discretion in the realm of fiscal surveillance (Schimmelfennig 2015: 189-191). Building on some of liberal intergovernmentalism's tenets, the "new intergovernmentalism" (Bickerton *et al.* 2015) has also been applied to the governance of the euro crisis. This approach focuses on integration without supranationalism, as a result of more direct interactions between domestic preference formation, and institutional choices at the European level. In particular, the creation of intergovernmental *de novo* bodies in the domains of fiscal capacity and banking supervision has been explained by reference to the problems of public justification associated with strengthening existing supranational institutions (Bickerton *et al.* 2015: 713-714; Howarth and Quaglia 2015).

A third set of contributions on the institutional response to the euro crisis draws on historical institutionalism, a theory of institutional change that is not specifically targeted at explaining European integration, but broadly captures path-dependent institutional evolution over time. In line with the theory's general penchant for incrementalism and inertia, accounts of the euro

[5] Neo-functionalists, following Pierson's historical institutionalist reiteration of the theory, focus less on functional spillover, but ultimately also subscribe to the integration-spurring effect of institutional efficiency problems; see Schimmelfennig (2012: 2014), Yiangou *et al.* (2013).

crisis highlight the continuities in institutional developments and seek to explain the seeming absence of abrupt change, *i.e.*, complete institutional overhaul, in the face of an existential crisis (see especially Schwarzer 2012; Salines *et al.* 2012). Gocaj and Meunier (2013) argue that the contingent initial creation of the rescue mechanisms was decisive for the path subsequently pursued, including the setting up of the EFSF and the ESM, because of sunk costs and complementary relationships with other institutions associated with the initial decision. Verdun (2015: 225-227), on the other hand, highlights that even the earliest crisis measures were building on previously existing European institutions by "copying" their design features. Taking the unconventional ECB measures as a starting-point, the most recent contribution to this debate even acknowledges that the EMU has seen its institutional path altered, but, at the same time, applauds this rupture for creating institutional "ambiguity within EMU, a feature that increased its flexibility and, amid the paralysis of the EMU's political structure, enabled it to overcome the financial crisis". (Krampf 2016: 2) This functionalist apology of discretionary politics in the euro crisis is only the bluntest among many contributions that equate more supranational authority with a capacity for collective action, and thus with integration achievements.

While not an exhaustive survey of the available political science literature relating to the European crisis, these seem to be the dominant themes and explanatory approaches structuring the debate at the core of the discipline. At an abstract level, the contributions highlight that a political crisis does not need to provoke a crisis in political science: a lot of the developments during the crisis can actually be conceptualised and accounted for by reference to existing theories of integration and institutional change. On closer inspection, however, it is questionable how laudable the strict adherence to the inherited wisdom is in the light of such fundamental structural transformations that the crisis provoked. It seems to us that this convenient accommodation is seriously deficient for a number of interdependent reasons.

Firstly, the almost exclusive reliance on the familiar concepts of integration theory narrows the view on what is deemed relevant and in need of explanation. It naturally sets the focus on the – analytically speaking – usual features of the phenomenon: structural outcomes in terms of integration/disintegration (see also Eppler and Scheller 2013). Consequently, the specific political, legal, and discursive processes in which (dis-) integrative steps are decided are mostly overlooked. Yet it is especially this dimension which can be expected to be affected by crisis conditions. Secondly, this analytical normalcy also leads to a "normative normalisation" of the crisis governance. On the one hand, the portrayal of the methods and outcomes of European crisis management as "business as usual" generally conveys the image of a phenomenon that requires no normative questioning. On the other hand, many integration theories exhibit a normative bias in favour of more integration so that integrative outcomes of crisis politics are

even treated as accomplishments (see especially Ioannou *et al.* 2015: 164). For example, the neo-functionalist accounts tend to provide *ex post* rationalisations for the integrative decisions taken during the crisis, which suggest a certain necessity of the measures in times where uncertainty and political conflict are actually the reigning structural features. The crisis decisions thus not only appear as geared towards the correct overall aim, but also as logical and overdue.[6]

To be sure, our point is not to criticise the application of theories of integration and institutional change as frameworks for an explanation of institutional developments in the crisis *per se*. Taken by themselves, these are insightful contributions. However, the point is that, by predominantly relying on these theories, the discipline at large: a) fails to account for developments "below" the supranationalism/intergovernmentalism radar, and thus b) suggests a skewed normative idea about the European crisis response in general. In our view, also theory-guided political science would benefit from taking the "facticity" of normative concerns into account. This would lead it to reflect on the question of how the erosion of legitimacy of the integration project affects its theoretical toolkit.

II.3. The Undeclared State of Emergency and its Authoritarian Consequences

What we have characterised as the dominating political science mainstream, is by no means uncontested. Where social scientists venture to take a look at the normative legitimacy of the legal and political order that is emerging from the crisis, much more daunting pictures are being drawn (see, for a recent example, the contributions in Chalmers *et al.* 2016). This is due to both the processes by which the new institutional configuration has come about and the discretionary authority structures that it embodies.

With regard to the first dimension, we have to note that virtually all the crisis measures adopted intergovernmentally or supranationally seem more or less fundamentally at odds with established normative principles of European governance, be it the norm of democratic control, the norm of political contestation, or the principle of state sovereignty on matters not delegated to the EU level (White 2015a: 587–591). Take the example of the ECB's self-empowerment to act as a lender of last resort to financially distressed member states of the Eurozone: while already highly questionable from a legal perspective (see Section III below), the Bank's adoption of the SMP and later the OMT programme annihilated the democratic accountability structures that were based upon the pareto-optimising regulative competences delegated to the Bank. When it started its bond-buying programmes, the ECB measures became political decisions with

[6] Notably, a significant share of the political science contributions were authored or co-authored by scholars employed by European institutions, especially the ECB (e.g. Ioannou, Salines, Glöckler, Fehlker, Yiangou, O'Keeffe) and the Commission (e.g. Buti, Carnot).

distributional effects, that no "independent" non-majoritarian institution can claim to have the legitimate authority to take (e.g. Scicluna 2014:568; more generally Vauchez 2014). Or take the example of the operations of the so-called *Troika* outside the EU's legal framework. Not only were countries under its tutelage stripped off their fiscal sovereignty and budgetary autonomy, a number of economic and social rights of the affected individuals and entities were factually suspended for the sake of austerity (Fischer-Lescano 2014; Salomon 2015). All this was based upon justifications in terms of necessity, that hardly tolerated opposition, far removed from an exchange of arguments in the deliberative sense.

A few scholars working at the intersection of law and political science have started to explore this phenomenon as a transnational form of exceptionalism that resembles, but, in important ways, also deviates from, the authoritarian kind of rule that Carl Schmitt advocated for the state of emergency (see Hufeld 2011; Dyson 2013; Joerges 2014; Kuo 2014; Kreuder-Sonnen 2014; 2016; White 2015a; 2015b). In White's (2015b: 302-303) influential formulation, we are dealing with emergency politics defined as:

> "[...] a distinctive mode in which actions contravening established procedures and norms are defended - often exclusively - as a response to exceptional circumstances that pose some form of existential threat. [...] A sense of urgency pervades emergency politics, and is commonly used to excuse the pre-empting of debate and patient efforts to build public support. Necessity rather than consent is the organising principle."

In contrast to the functionalist observer, who would treat the state of exception (*i.e.*, the emergency situation) as a justification for breaking with norms that have to be understood as inhibiting (integration) progress, this approach critically engages the emergency rule that characterises a state of exception and remains suspicious of any claims to functional necessities. In contrast to the mainstream accounts, contributions in this critical camp, share the view that the management of the euro crisis represents a deviation from, not a continuation of, European "legal normalcy", since "unconventional" measures of monetary policy (such as the ECB's bond-buying programmes and bailouts) and intrusive controls (such as *Troika* conditionalities), adopted by reference to emergency conditions are incompatible with the former constitutional order of the EU.

With regard to the second dimension, the longer-term consequences of this emergency politics for the EU's overall authority structures, we have to note a number of democratic and judicial accountability problems that have become engrained in the EU's legal order, not least due to the "constitutional sanctification" of much of the crisis law through the European Court of Justice

(see Section III below). As Dawson (2015: 988-990) shows, the crisis-mode of intergovernmental decision-making outside the EU legal framework has undermined democratic control at both the member state and at the EU level, without providing for alternative avenues of political accountability (see also Enderlein 2013). Moreover, he argues, the delegation of discretionary powers to supranational institutions has rendered judicial review exceedingly difficult and thus weakened legal accountability structures since the authorities' technocratic margin of appreciation has been extended to a degree which leaves little basis for courts to challenge official decisions legally (Dawson 2015: 986-988).

To account for these emerging structures conceptually, the notion of *authoritarian rule* has been invoked more and more regularly (starting with Joerges and Weimer 2013). Conceptualised as the ideal-typical opposite to liberal constitutionalism based upon democracy and the rule of law, authoritarianism denotes a form of rule that is based upon the autocratic constitution of authority and the arbitrary exercise of authority (Kreuder-Sonnen and Zangl 2015: 572-577). According to this perspective, the euro crisis has brought about spheres of authority which were constituted in undemocratic processes which undermine the legal authority structures (autocracy) and which are ruled by executive discretion beyond judicial review (arbitrariness). Arguably, the bailout regime, the Excessive Imbalance Procedure (EIP), and also the ECB's OMT programme represent partially authoritarian legal sub-orders in the EU's economic system (Kreuder-Sonnen and Zangl 2015: 583-585). All three emerged from executive-dominated and legally-questionable processes which altered the constitutional authority structures to the detriment of representative bodies (see the discussion above). They also provide ample discretion to executive actors in exercising their authority: there are hardly any limits to what the *Troika* may require from states that are under one of its support programmes; the EIP gives the Commission almost full discretion over the corrective measures to be recommended and enforced (Scharpf 2013); and the ECB enjoys the privilege of a wide margin of appreciation to determine its competences based upon its own expertise.[7]

Hence, in sharp contrast to the either normatively agnostic or even affirmative mainstream political science accounts of the governance of the euro crisis, scholarship that looks into the normative legitimacy of the political order generated during the crisis is much more critical, in that it insists that Europe's state of emergency is challenging the very validity of the theories upon which integration research has relied.

[7] See, in more detail, Section III.2 below.

III. THE CONCEPTUAL FRAGILITY OF EUROPEAN LAW AND JURISPRUDENCE

The euro crisis and the distinctive mode of emergency governance which it provoked not only exposed new centres of political and technocratic power in Europe that have been able to operate with basically unchecked discretion (see Section II.3.). It also brought to the fore the existing conflict constellations and architectural flaws in the EU's legal order, which, in turn, shed light on the paucity of some of the most prominent legal approaches to normatively justify transnational authority in the EU: treaty constitutionalism, economic constitutionalism, and functional constitutionalism. In the first part of this section, we sketch the conceptual and theoretical underpinnings of these approaches, and contrast them with the realities of a European Union under stress. In essence, we hold that these normative theories have failed, both in terms of re-construction and prescription, to provide a convincing justificatory basis for postnational governance in Europe. Note the structural affinity with the argumentation in the preceding section. Just as we highlighted the limits to the reliance on conventional approaches in political science, we now discern an exhaustion of the conceptual underpinning of the most influential legal re-constructions of the integration project.

It is in the context of this normative vacuum that legal scholarship has taken refuge in the reasoning of its highest authority: the Court of Justice of the EU. Yet, as we argue in the second part of this section, the Court itself had to bow before the alleged political necessities of the European crisis that made it seem imperative for the Court not to get in the way of what was portrayed as the emergency rescue of the Union as a whole. The Court's two most important crisis rulings in *Pringle* and *Gauweiler* are proof of an overburdening of the law and the judiciary, which has highly adverse effects on the legal and political order of the EU: for the sake of "stability", the Court felt compelled to legally accommodate extra-constitutional crisis measures and thus to normalise the state of exception.

III.1 Three Justifications for Postnational Authority and their Demise in the Light of the Crisis

We focus on three legal conceptualisations or normative approaches to the justification of postnational authority that had a long-term and lasting impact. All of them have submitted alternatives to democratic constitutionalism as we know it from the nation state. This triad or trinity is: treaty constitutionalism (as envisaged by "integration through law"); economic constitutionalism (as a justification of ordoliberal economic governance); and functional constitutionalism (as a justification of technocratic rule).

Treaty Constitutionalism

The concept of treaty constitutionalism, *i.e.*, the re-interpretation of a treaty between sovereign states as a constitutional charter akin to a state constitution, is closely related to the "integration through law" agenda. In post-war Europe, integration through law promised the taming of the Weberian *nation-state* by means of the establishment of a supranational legal order and the transformation of the state of nature amongst the Member States of the Union into a Kantian *Rechtszustand* with legally-binding commitments. J.H.H. Weiler, the most important advocate and exponent of the integration through law agenda, initially demonstrated a high degree of constitutional modesty by underlining the political embeddedness and dependence of legal supranationalism (Weiler 1981). Later, however, he forgot to proceed with similar caution when presenting law as "the object and the agent" of integration (Dehousse and Weiler 1990). He became an influential advocate of the emancipation of European law from international law. This move occurred under the leadership of the ECJ with its seminal judgments on "direct effect",[8] "supremacy",[9] and the conceptualisation of the reference procedure as a means of empowering private parties and national courts to act jointly with the ECJ as supervisors of national legislatures. As Weiler summarised it:

> "in critical aspects the Community has evolved and behaves as if its founding instrument were not a Treaty governed by international law, but, to use the language of the European Court of Justice, a constitutional charter governed by a form of constitutional law" (Weiler 1997: 97).

The reach of these doctrines and the impact of "treaty constitutionalism" became breath-taking. Any piece of secondary European legislation, so the ECJ explained in 1978, prevails over national constitutional law.[10] The community of European law scholars gave its blessing to all this. Neither the characterisation of the jurisprudence of the ECJ as a judicial *coup d'état* (Stone Sweet 2007), nor the not-so-noble historical past of the supremacy doctrine (Joerges 2003: note 92) had irritating effects. Some kept wondering, however. These included Dieter Grimm, who has continued to raise doubts for more than two decades (Grimm 1995; 2016).

What is left of "treaty constitutionalism" after the financial crisis? The machinery of European crisis management replaced - in very essential regards - the "Community method" with the so-called "Union method": a resort to "*Unionsersatzrecht*" created by international agreements. The

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[8] Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen [1963] ECR 1.

[9] Case 6/64, *Flaminio Costa* v. *E.N.E.L.* [1964] ECR 585.

[10] Case 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal SpA [1978] ECR 629.

most outstanding example is the "Fiscal Compact", the Treaty on Stability, Co-ordination and Governance in the Economic and Monetary Union, signed by 26 of the 28 EU Member States on 2 March 2012.[11] The provisions of this treaty curtail the budgetary autonomy of its signatories and thereby interfere with an essential part of democratic constitutionalism. The pact is, by the same token, a functional amendment to the TFEU, albeit one which was not enacted through a Treaty amendment. It is, instead, a creature of international law, which now forms the primary instrument within a burgeoning body of "*Unionsersatzrecht*" that exists alongside the European Treaties. The oddity of this move is striking. Treaty constitutionalism was meant to stabilise the European accomplishments. These accomplishments are now abrogated by the very instrument upon which they relied. This self-destruction met with some critique (e.g., Höpner and Rödl 2012; Tomkin 2013; Everson and Joerges 2016). But it was questioned neither by the CJEU nor by Germany's *Bundesverfassungericht.* The high respect of European law scholarship for the Court in Luxembourg has remained unshaken. We will argue in the next section, however, that this Court failed to defend its autonomy and the integrity of the law.

Economic Constitutionalism

One explanation for the enormous authority of the CJEU and the ideational success of the integration through law agenda lies in the fact that the cornerstones of the doctrinal edifice were fully in line with the interests of powerful economic actors. This counts for both the understanding of the economic freedoms as fundamental rights which could be invoked by Europe's market citizens against their national sovereigns, and the promotion of strong judicial review. The accordance between legal doctrines and economic interests is the basis of a *de facto* alliance between the integration through law agenda and "economic constitutionalism" which had become the core message of German Ordo-liberalism.

The Ordo-liberal version of economic constitutionalism provided a conceptual framework within which European integration could be legitimated: the freedoms guaranteed in the EEC Treaty, the opening up of national economies, the anti-discrimination rules, and the commitment to a system of undistorted competition, were interpreted as a principled "decision" for the establishment of a free market economy and its competitive ordering. It is worth underlining in our context that, in this Ordo-liberal reading, the Community acquired a legitimacy of its own. The validity of Europe's economic governance was not dependent upon some foundational political democratic act. Quite to the contrary, the EEC could be perceived as a non-majoritarian settlement *par excellence*; its competitive order was based upon law - and shielded against political influence (Wigger 2008: 131ff.). Interpreting the pertinent Treaty provisions as

[11] Available at: www.consilium.europa.eu/european-council/pdf/Treaty-on-Stability.

prescribing a law-based order committed to guaranteeing economic freedoms and protecting competition by supranational institutions resolved the thorny legitimacy *problématique* of European governance elegantly. The legitimacy of the economic "Ordo" was independent of the state's democratic constitutional institutions. By the same token, it could be argued that it imposed limits upon the Community and that discretionary economic policies were illegitimate and unlawful (for a concise summary, see Böhm 1966; 1989; for a seminal re-conceptualisation, see Mestmäcker 1973).

Economic and Monetary Union as established by the Maastricht Treaty of 1992 is widely perceived as a consummation of the Ordo-liberal constitutional agenda. The prevailing view has its strongest basis in the judgment of the German Constitutional Court, of 12 October 1993, which opened the way to the ratification of the Maastricht Treaty by Germany.[12] What the Court had to say about the economy was a clear but rarely noticed break with its former resistance against economic constitutionalism.[13] The passages on Monetary Union state that, the economic constitution with its substantive and institutional substitution of politics and policies by legal rules were a *sine qua non* for Germany's participation within the EMU. This assertion was the Court's response to the argument that the Union was about to acquire such wide-ranging competences that nation states could no longer act as the masters of their "*democratic statehood*". Economic integration, so the Court held, was an autonomous and *apolitical* process, which might, and indeed must, take place beyond the reach of Member State political influence. By virtue of a constitutional commitment to price stability and rules that guarded against inappropriate budgetary deficits, the EMU was correctly structured. Accordingly, all doubts about the democratic legitimacy of economic integration were diverted. To rephrase the argument slightly: yes, the Treaty is compatible with the German Basic Law, but this is true only because it is inspired by Germany's stability philosophy and only as long as this stability pact is actually respected.

It all sounds quite Ordo-liberal. But this appearance is deceptive. The EMU, as established by the Treaty of Maastricht and complemented by the Stability Pact of 1997,[14] was a defective product which could not claim constitutional validity of any kind. This point is of crucial importance for our argument. To summarise it in a nutshell (see, in more detail, Joerges 2016: 312 et seqq.): The assignment of an exclusive monetary policy competence to the Union (Article 3(1) c TFEU) and

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[12] *Manfred Brunner and Others* v. *The European Union Treaty* (Cases 2 BvR 2134/92 & 2159/92, BVerfGE 89, 155), [1994] 1 C.M.L.R. 57.

[13] See the *Investitionshilfe* judgment cited above (n. #) and thereafter the seminal *Mitbestimmungs–Urteil* of 1 March 1979, BVerfGE 50, 290.

[14] Official Journal C 236, 02/08/1997, 1.

the confirmation of national powers in the fields of economic and fiscal policy has produced complex conflict configurations. These are generated by the heterogeneity of the political economies of the eurozone. Not only does the diversity of socio-economic conditions even within the Eurozone generate a variety of interests, but the differences in the institutional configurations and economic cultures and in the social norms practiced also serve to explain why European command and control governance cannot accomplish its objectives. What is so problematical about the European case and what distinguishes the European order from consolidated constitutional democracies is the lack of a political infrastructure and the unavailability of an institutional framework in which democratic political contestation could occur and legitimatise a completion or improvement of the imperfect edifice that has been established.

Functional Constitutionalism

The "dominant institutional components" of the integration project, which embody its core "normative claim to constitutional authority", writes Turkuler Isiksel (2014: 2), is functionalist rather than democratic. This authority is based upon and "justified with regard to technocratic competence". And indeed, functional equivalents to Isiksel's notion are widely used: "executive power" (Curtin 2009), "executive federalism" (Schütze 2010), and "transnational administrative power" (Lindseth 2010) are but prominent examples. This has a long-standing tradition. Ever since its inception, the integration project has been characterised as bureaucratic machinery, not only by lawyers, but also by political scientists (Puntscher-Riekmann 1998; Trondal 2010). One master thinker deserves particular attention, namely, the lawyer Hans Peter Ipsen, the influential founding father of European Law as a new legal discipline in Germany (in particular Ipsen 1972). He searched for a type of rule whose validity was not dependent on democratic legitimacy. With his understanding of the European Communities as "*Zweckverbände funktionaler Integration*" (organisations with functionally-defined limited objectives), Ipsen rejected both further-reaching federal ambitions *and* earlier interpretations of the Community as a mere international organisation. He characterised Community law as a *tertium* between federal or state law, on the one hand, and international law, on the other: an order constituted by its "objective tasks" and adequately legitimated by their resolution (see Ipsen 1972: 176 ff.).

What is so remarkable about Ipsen's theory in the light of the turn to a comprehensive machinery of technocratic crisis management after the financial crisis is, the effort to *restrain* the Europeanisation of powers and activities. This is the price that the European Economic Community had to pay for its lack of democratic legitimacy. It is equally remarkable that two non-lawyers of exceptional standing followed this line of thinking. One is Fritz W. Scharpf with his distinction of (democratic) input and (non-democratic) output legitimacy (e.g., Scharpf 1999),

the other is Giandomenico Majone with his conceptualisation of the Union as a "regulatory state" (e.g., Majone 1996). It is not accidental that both are now among the most ardent critics of Europe's responses to its crisis (see e.g. Majone 2014; Scharpf 2015). They did not change their theoretical premises. Majone simply observes that Europe is no longer able to operate efficiently while its democratic deficit has turned into a "democratic default" Majone 2014: 149 ff.). Scharpf has – more persistently than Majone – been concerned with Europe's "social deficit" which he has ascribed to the decoupling of economic and social integration, and the institutional furtherance of negative over positive integration (Scharpf 2002). The turn to austerity politics and the need for "internal devaluation" in states which are experiencing "financial difficulties" amounts, in his view, to the destruction of Europe's social legitimacy. In addition, the on-the-whole not so impressive success of austerity politics damages the "output legitimacy", which has provided an *ersatz* for the deficits of its "input legitimacy".

We have to conclude, sadly, that the flaws inherent to the three alternatives to democratic constitutionalism persist, and have been deepened, rather than cured, by the responses to the financial crisis.

III.2 Legalisation by the CJEU

The European project lacks theoretical foundations which would back its legitimacy. It is unlikely to gain new democratic legitimacy in the foreseeable future. Can it turn back to any of the three alternatives discussed in the previous section? We have ruled out economic constitutionalism by our rejection of a constitutional characterisation of EMU. We have also ruled out the output-legitimacy alternative in view of the hardships Europe's crisis management imposes on so many citizens. The one and only remaining candidate, then, is law, as defined by the CJEU. The Court has, indeed, handed down two judgments on the management of the crisis, in both cases sitting in plenum.[15] The support in academic quarters remained overwhelming, albeit not unanimous.[16]

Pringle

The CJEU came into direct contact with European "crisis law" for the first time thanks to the complaints of Thomas Pringle, Member of the Irish Parliament, against the involvement of his government in the establishment of the ESM – and the readiness of the Irish Supreme Court to

[15] Case 370/12, *Pringle v Ireland*, Judgment (Grand Chamber) of 27 November 2012; Case C-62/14, *Peter Gauweiler and others v. Deutscher Bundestag*, Judgment of 16. June 2015 (Grand Chamber).

[16] Our comments here will be brief. For more detailed remarks, see, on *Pringle*, Everson and Joerges (2016), and, on *Gauweiler*, Joerges (2016). We refrain here from an evaluation of the pertinent jurisprudence of the German *Bundesverfassungsgericht* and refer, in this regard, to Everson and Joerges (2014).

do what the German *Bundesverfassungsgericht* (FCC) had, until its reference in the OMT litigation, anxiously avoided, namely, to submit a reference for a preliminary ruling to the CJEU. Pringle had commenced this litigation in April 2012; the CJEU (sitting as Full Court, with all 27 judges) handed down its judgment on 27 December 2012.

In his complaint, Thomas Pringle had argued that the ESM-Regime constituted a usurpation of competences which were not conferred to the Union. This argument concerned hence the substitution of the EMU, as established by the Maastricht Treaty, by a *de facto* Treaty amendment. The substantive and methodological core problem which the Court had to resolve stems from the bailout prohibition of Article 125 TFEU, and the emergency exception in Article 122 (2) TFEU. The Court re-states the conceptual background of the former provision succinctly:

> "The prohibition laid down in Article 125 TFEU ensures that the Member States remain subject to the logic of the market when they enter into debt, since that ought to prompt them to maintain budgetary discipline. Compliance with such discipline contributes, at Union level, to the attainment of a higher objective, namely, maintaining the financial stability of the monetary union."

How can this philosophy be reconciled with the collective rescue measures which the ESM-Treaty legalises? The answer of the Court is straight forward:

> "Since Article 122(1) TFEU does not constitute an appropriate legal basis for any financial assistance from the Union to Member States who [sic] are experiencing, or are threatened by, severe financing problems, the establishment of a stability mechanism such as the ESM does not encroach on the powers which that provision confers on the Council."[17]

This answer approves the transformation of the European Economic Constitution into a new regime. It goes without saying that this new regime must develop a logic of its own:

> "[T]he ESM Treaty does not provide that stability support will be granted as soon as a Member State whose currency is the euro is experiencing difficulties in obtaining financing on the market. [...] [S]upport may be granted to ESM Members [...] only when such support is indispensable to safeguard the financial stability of the euro area as a

[17] *Pringle* (note 17), para. 135.

whole and of its Member States and the grant of that support is subject to strict conditionality appropriate to the financial assistance instrument chosen."[18]

When these interpretations are read together, the full picture of the new constitutional constellation becomes clearly visible: the non-bailout philosophy with its appeal to the autonomy and responsibility of the Member States is being replaced by a regime of collective governance. Nowhere in the *Pringle* judgment does one find an explanation as to the conceptual basis or a means-ends rationality of the new modes of European governance. The law delegates such matters to politics without caring about the democratic legitimacy of political decision-making. The CJEU has given its blessing to European crisis policy and its monitoring of unparalleled intensity. We submit that all this is not the result of sinister conspiracies, but takes place because the dynamics of the crisis demand too much of the law. In the time when the Court deliberated the judgment, the euro crisis reached new levels of intensity in public perception, and policy-makers framed the issue as a life-or-death question for the common currency. The Court refused to defend the law as it stands because it had to fear that such a ruling would make things even worse in an acute phase of the crisis – a political responsibility that it was not willing to take.

Gauweiler

"Within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough."

Thus spoke Mario Draghi, President of the European Central Bank (ECB), on 26 July 2012.[19] The importance of the then ensuing litigation on the legality of Draghi's announcement and the OMT programme can hardly be over-estimated. Germany's FCC attracted enormous attention for submitting its first reference to the Luxembourg court and provoked a flood of critical and angry comments for the framing of its reference:[20] Had the ECB, by its explicit reference and approval of the conditions of the financial assistance programmes of the EFSF and/or the ESM, overstepped its monetary policy competence and interfered with the powers of the Member States in the sphere of economic policy? Was the OMT programme compatible with the prohibition of monetary financing (Article 123 TFEU)? The FCC, furthermore, wondered how the support granted could be compatible with the budgetary autonomy and responsibility of Member

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[18] Ibid., para. 116.

[19] *Verbatim* at https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html.

[20] BVerfG, 2 BvR 2728/13 of 14.1.2014, http://www.bverfg.de/entscheidungen/rs20140114_2bvr272813en.html.

States, which it held to be "constituent for the design of the monetary union" as evidenced by Article 125 TFEU).[21] The provocative twist in the reference was the clarity of the FCC about its own answers and the somewhat opaque conditioning of its obedience to the response from Luxembourg. The form of this response, which the FCC received in the judgment of 16 June 2015, was equally provocative. The reader feels drawn into the boring triviality of cases like "*Molkereizentrale Westfalen–Lippe* v. *Hauptzollamt Paderborn*".[22] The matter, however, is anything but trivial.

Some excitement is apparent in the Opinion of the Courts Advocate General.[23] The learned AG observed in his discussion of the notions of monetary and economic policy:

> "The Treaties are silent ... when it comes to defining the exclusive competence of the Union in relation to monetary policy."[24]
>
> "The division that EU law makes between those policies is a requirement imposed by the structure of the Treaties and by the horizontal and vertical distribution of powers within the Union, but in economic terms it may be stated that any monetary policy measure is ultimately encompassed by the broader category of general economic policy."[25]
>
> "It follows that the delineation which the text of the Treaty expects us to make when characterising measures as monetary rather than economic policy has to rely on "the objectives ascribed to that policy."[26]
>
> In contrast to facts, which can be ascertained when a decision is being taken, it is usually uncertain and controversial whether such objectives can be realised at all, and, if so, how. What can nevertheless be ascertained is whether a measure "belongs to the category of instruments which the law provides for carrying out monetary policy".[27]

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[21] Para. 41; see also para. 71.

[22] Case 28/67, Judgment of 3 April 1968, ECLI:EU:C:1968:17 ECLI:EU:C:1968:17; we would like to thank Hauke Brunkhortst (Berlin/Flensburg) for making us aware of this affinity.

[23] Opinion of GA Cruz Villalòn delivered on 14 January 2015.

[24] Cruz Villalòn, ibid., para. 127.

[25] Ibid., para. 129.

[26] Ibid., para.127.

[27] Ibid., para. 130.

But here the law's conditional programming ends. Independent expertise must step in. The ECB has explained that it *intended* to pursue a monetary policy objective and enjoys broad discretion in its framing and implementation.[28]

> "The ECB must … be afforded a broad discretion for the purpose of framing and implementing the Union's monetary policy. The Courts, when reviewing the ECB's activity, must therefore avoid the risk of supplanting the Bank, by venturing into a highly technical terrain in which it is necessary to have an expertise and experience which, according to the Treaties, devolves solely upon the ECB. Therefore, the intensity of judicial review of the ECB's activity, its mandatory nature aside, must be characterised by a considerable degree of caution."[29]

The CJEU, in its judgment of 16 June, endorses this reasoning. Just like the AG, the Court underlines that the "Treaty contains no precise definition of monetary policy but defines both the objectives of monetary policy and the instruments which are available to the ESCB".[30] What the ECB decides to undertake is legal as long as "it does not appear that the analysis of the economic situation of the euro area as at the date of the announcement of the programme in question is vitiated by a manifest error of assessment".[31]

What is then left, one may ask, of the powers of the member states in the sphere of economic policy? These powers depend, first of all, on how the ECB defines its mandate. The implementation of this mandate comprises - and even requires - the linking of the OMT programme to the conditionality of financial assistance.[32] The ECB is also entitled to proceed selectively in its buying activities, and to focus on those states in which the monetary policy transmission channels are blocked.[33] The CJEU follows suit. The conditionality of financing which the Court had qualified as a matter of *economic policy* in its *Pringle* judgment, in view of their function "to safeguard the stability of the euro area as a whole",[34] does not affect the

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[28] Ibid., paras. 109-112.

[29] Ibid., para 111.

[30] *Gauweiler* (note 17), para. 41.

[31] Ibid., para.74.

[32] Ibid., para145.

[33] Ibid., para 153.

[34] *Pringle* (note 17), para. 56.

qualification of the OMT programme as monetary policy, because the latter is meant "to support the general economic policies in the Union", as provided for by the Article 119(2) TFEU.[35]

The unruly conflict between European monetary policy and national economic policy has been settled through a novel regulatory arrangement, in which the ECB is an extremely powerful actor, albeit one which needs the support of the machinery ensuring the targeted conditionality of financial assistance. "[T]he Union today is governed by a set of principles relating both to its objectives and to its boundaries", so the AG assures us and does not hesitate to characterise this arrangement as a "constitutional framework".[36] This, however, is a framework beyond any constitutional, let alone democratic, credential. The ordering of the entire economy of the eurozone is conceptualised as a non-political *epistemic* task. This task is delegated to a supranational bureaucracy, which enjoys practically unlimited discretionary powers. The judgment in *Gauweiler* is by no means as trivial as the CJEU makes it appear.

Both cases demonstrate an overburdening of the law and the judiciary in times of political crisis and conceptual paucity. It is an understandable reasoning of the Court not to take a legalistic stance which could have provoked far-reaching political consequences for which the judicial system is not the legitimate author. On the other hand, however, the Court's deferential stance also had huge, albeit less visible, consequences: it sanctified extra-legal emergency measures constitutionally and thus contributed to normalising discretionary authority in the new (anti-) constitutional constellation.

IV. SUMMARY AND CONCLUSIONS

Our review of the pertinent crisis literature in our disciplines has, in parts, confirmed their respective distinctiveness but at the same time also revealed striking affinities. With regard to the disciplinary schism, Jürgen Habermas' (1994 [1998]) remarks remain pertinent: political scientists tend to focus, in their analyses, on the empirics which they are witnessing and on their explanations, but refrain from making a normative evaluation. This is why they can continue to refer to the main paradigms of integration theory, underline that European integration is moving into ever more fields, and assume that the present *problématique* is just another one in a long series of crises which have at the end strengthened the integration project. To be sure, the gradual erosion of the social legitimacy of the integration project, the rise of populism and anti-European movements, the move from the formerly permissive consensus to the by now constraining disagreement, the demise of the "community method" and

[35] Ibid., para. 59.

[36] Note 27, para. 215.

the advent of the "Union method", the new asymmetries between the North and the South and the re-configuration of powers in the Union do, by no means, go unnoticed. But all these observations do not provoke re-consideration in principle of the long-established orientations and expectations, let alone the search for a new paradigm.

To the legal discipline, on the other hand, the most visible impact of the crisis is the enormous output of legal acts which are all meticulously examined, categorised, and commented upon. Such commenting is confronted with the normative claims of the affected polities and their citizens, with controversies over institutional innovations and mutations, with debates over the compatibility of the objectives and the means of European crisis politics with the commitments to democracy, the rule of law, justice and solidarity, as enshrined in the Treaties. As we have documented, there is more normative contestation in legal discourses than in the social sciences, a schism that is hardly surprising in view of the detachment of legal reasoning from empirical causalities, on the one hand, and the normative complacency of social sciences, on the other.

On closer inspection, however, we have noted that the rift between the disciplines is bridged by parallel developments at the core and the periphery of legal and political science, respectively. Also in the legal mainstream, for example, the performance of the core European institutions, the ECB included, and even the establishment of the *Troika* are quite positively evaluated (see Möllers 2015 with extensive references). And just as social scientists continue to defend the neo-functionalist integration theorems against intergovernmentalism – and *vice versa* – legal research remains committed to treaty constitutionalism, integration through law, technocratic governance and economic efficiency. This continuity is particularly strong with regard to the foundational doctrines of direct effect of the economic freedoms, the primacy of European law, and, most notably, the authority of the CJEU in the interpretation of the contents and impact of the European law. By contrast, the critical peripheries of legal and political science in the field of European studies, have found a common ground in the notion of an 'undeclared state of emergency' which marks Europe's crisis governance and potentially shapes its long-term institutional structures.

This concomitance of critique and complacency seems to us to constitute the gist of the matter. We submit that both of the diametrically-opposed positions complement each other in a seemingly paradoxical relationship. On the one hand, political science can defend its adherence to inherited paradigms only because it refrains from spelling out the political implications of the normative failures of the mutation of Europe and its turn to authoritarian modes of governance under the impact of the crisis: this stance we have characterised as a one-dimensional concern with facticity which fails to take the erosion of the legitimacy of the European project seriously.

On the other hand, we have diagnosed a failure of legal scholarship to respond to the fragility of the various strands of legal integration theories and the unwillingness to address the demise of the commitments of the European project to democracy, the rule of law, and social justice. Against this background, the recent confirmation of the legality of Europe's crisis management by the CJEU can be characterized as a move towards "authoritarian legality" in the EU's legal order as the law partially forfeits its liberal content through "broad judicial deference to executive discretion; and a reluctance to remedy serious rights violations or to be held accountable for them" (Diab 2015: 9).

On one hand, we thus underline the normative failures of post-crisis Europe. On the other hand, however, our discussion of the shortcomings in both the causal and especially the normative theories of European integration also highlights that these failures cannot be cured by a restoration of the pre-crisis constellation and its legal frameworks. There is no such thing as a (formerly) safe harbour into which the integration project could return. Which way to go then? What, then, might be an alternative? One proposal comes from political economist Dani Rodrik who suggests that we should look for "ways of undoing [the EU] selectively, opening up policy space for national governments in money, finance, and regulation". On the chosen path of austerity-led European crisis law, he adds "the future of monetary union looks particularly bleak, as it is hard to see a single currency can be reconciled with multiple (democratic) polities" (Rodrik 2014: 6). Rodrik's doubts as to the wisdom of austerity politics have recently been confirmed by a study from IMF officials (Ostry *et al*. 2016). Once both the input *and* the output legitimacy have become so questionable, the search for alternatives should not be discredited as a critique of the European project. We are confident that contestation and critique will generate new ideas and perspectives for a European future beyond the present emergency politics.

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